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**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990**

**FEIST PUBLICATIONS, INC.,
Petitioner**

v.

**RURAL TELEPHONE SERVICE COMPANY, INC.,
Respondent**

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner, Feist Publications, Inc. ("Feist"), respectfully submits this brief in reply to the briefs filed for and in support of Respondent, Rural Telephone Service Company, Inc. ("RTSC").

REPLY STATEMENT OF THE CASE

A. The Facts this Case Does *Not* Involve.

This case does *not* involve copying of RTSC's directory *as a whole* (or any copyrightable aspect thereof). This case involves only white page listings (name, address, and telephone number) contained in the telephone company's directory. While the briefs of RTSC and its *amici* are quite vague and at times inaccurate in their description of the facts of the case, there is no claim, nor any basis for a claim, that Feist copied or used anything other than names, addresses, and telephone numbers. (See J.A. 9, Complaint ¶1 "listings.") This case does *not* involve *all* compilations, *nor* does it involve data bases, *nor* the telephone directory as a whole.

B. The Facts this Case Does Involve.

This case involves two telephone directories as published by RTSC and Feist. Those directories are on file herein with the Clerk (See Exhibits 2 and 3 to Complaint, R. 1, Separate Folio). Both directories contain forward text, white page listings (name, address, and telephone number), and a section of yellow page advertising. RTSC's directory additionally contains a second white page section containing white page listings (name, address, and telephone number) which RTSC licensed from other phone companies. Feist's directory additionally contains red pages of community maps and blue pages of government and school listings. This case involves *only* the white page listings in the first section of RTSC's directory, nothing more.

Examination of Exhibits 2 and 3 clearly reveals that Feist's directory is not a copy of RTSC's directory. The only potential facts which Feist could have copied from RTSC's directory are 4,935 white page listings which are from exchanges serviced by RTSC and which are included in Feist's directory. Of the 4,935 overlapping listings, 3,626 differ.¹

Feist used no information from RTSC's forward text, yellow pages, or the second set of white pages included by RTSC in its directory. Feist used only white page listing information from the first white page section of RTSC's directory. The 4,935 listings from RTSC's exchange areas are alphabetically interfiled in the Feist directory with 40,000 other listings from the entire northwest corner of Kansas.

SUMMARY OF THE ARGUMENT IN REPLY

RTSC and its *amici* contend that basic preexisting factual data—names, addresses, and telephone numbers—collected

1. Respondent's Brief ("Resp. Br."), p. 3, asserts that "3,879 or 78 percent of the copied listings appeared unchanged in the Feist directory." That assertion is without support from the record. See J.A. 54, ¶16; J.A. 57. (RTSC also asserts that Feist included "several of the fictitious listings." The record shows *four* of 28 fictitious listings were included by Feist. J.A., p. 53, ¶10.)

by a telephone company in the course of its business and assembled in alphabetical sequence in a generic and unoriginal format, cease to be public domain material upon publication in the white pages of RTSC's telephone directory. The contention is based on at least three incorrect propositions.

First, from the conceded premise that RTSC's combined forward text, white pages, and yellow pages directory is copyrightable *as a whole*, RTSC urges the conclusion that everything in the directory is copyrightable material protected by the compilation copyright. That is basically the reasoning followed and conclusion reached by the courts below. However, the absolute monopoly advocated by RTSC and its *amici* is unconstitutionally more inclusive than the limited copyright monopoly conferred upon a "compilation" by the 1976 Copyright Act. [17 USC §§101, 103(b).]

Second, after making the necessary concession that the 1976 Copyright Act governs this case, RTSC erroneously contends that the analysis and conclusion it seeks to defend not only can be harmonized with the statute, but indeed were adopted by it. However, RTSC cannot show any copyrightable selection, coordination, or arrangement in the alphabetical publication of its entire universe of data. In addition, the "sweat of the brow" cases relied upon by RTSC cannot be reconciled with the 1976 Act, and the scattered and tangential bits of legislative history cited by RTSC provide no basis at all for disregarding the plain language of the statute. [Patry, *Copyright in Compilation of Facts (Or Why the 'White Pages' Are Not Copyrightable)*, 12 Comm. & Law 37 (Dec. 1990) ("Patry article").]

Finally, while urging the Court to restrict its reading of recent precedents to those involving telephone directories only, RTSC and its *amici* argue that the Court should refrain from treating RTSC's unselective alphabetical list of names, addresses, and telephone numbers as uncopyrightable material because to do so would adversely affect unidentified interests in other undescribed compilations and "databases." However, this case concerns only the names, addresses, and telephone number published in the white pages of RTSC's

generic telephone directory, which are uncopyrightable, public domain facts [17 USC §102(b).]

From these propositions, RTSC ultimately urges this Court to adopt a minority view of the courts below which exempts telephone directories from the general constitutional and statutory law of copyright. The 1976 Copyright Act permits no such exemption. The plain language of the 1976 Copyright Act forecloses RTSC's arguments and compels the reversal of the decision of the courts below.

ARGUMENT

A. Any copyright in a telephone directory compilation as a whole, does not extend to the white page listing facts (name, address and telephone number) contained therein.

1. The issue here is not whether telephone directories as a whole are copyrightable, but rather whether the facts (name, address and telephone number) in the white pages thereof are copyrightable.

RTSC argues that "a compilation of names, addresses, and telephone numbers constitutes copyrightable subject matter." (Resp. Br. 9.) That is correct if the compilation meets the statutory definition of a compilation as contained in 17 USC §101. However, without the required statutory analysis, RTSC simply jumps to the conclusion that since *telephone directories* are compilations (in the ordinary sense of the term), therefore, *telephone directories* are copyrightable "compilations" as that term is specifically defined in the 1976 Copyright Act. That is incorrect—in logic, the fallacy of the undistributed middle. Telephone directories may be compilations, copyrightable *as a whole* under the statute if they meet the statutory definition contained in 17 USC §101. However, that is not the issue here. The issue here is whether the facts (name, address, and telephone number) contained in RTSC's white page listings are copyrightable. As this Court has said

in *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 548 (1985):

...copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original—for example...facts, or materials in the public domain...

Any copyright in RTSC's combined forward text, white pages, and yellow pages directory *as a whole* does not mean everything in the directory is copyrightable material. For example, in *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 205 (9th Cir. 1989) Chief Judge Goodwin noted that as copyrightable compilations, the plaintiff's organizers' "selection, coordination, and arrangement" were protectable, but the blank forms and common property contained within the organizers were excluded from protection.²

RTSC also attempts to read the authorship requirement out of the law by collapsing it into the related but distinct requirement of originality. RTSC asserts that its directories are copyrightable because they are original, i.e. not copied from another source. However, this is not enough; copyright subsists not in all original works but in "original works of authorship," 17 USC §102(a). See also U.S. Const., art. 8, cl. 8, § 8; "writings" of "authors." Confusion sometimes arises from the fact that "originality" is used as shorthand for "original works of authorship," a phrase that incorporates the requirement both of non-copying and authorship.

RTSC concedes that "anyone may discover for themselves and publish" the names, addresses, and telephone numbers of RTSC's subscribers. (Resp. Br. 24) RTSC and its *amici* (e.g., West Pub. 14) contend that the copyright law prohibits that discovery from being made by reference to RTSC's directory. However, this Court has made clear in *Harper & Row* that the constitutional prohibition on copyright protection

2. The case was returned for proper jury instructions since the jury may have found defendants infringed the plaintiff's copyright based upon the direct copying of such unprotected material, and not based upon copying of the "selection, coordination, or arrangement" of the organizers. Feist submits that is exactly the erroneous basis of the decisions below with regard to Feist's "copying."

of facts means more than just the right to consult the same sources as were used by the prior compiler. Copying of facts "from a prior author's work" is clearly permissible. *Harper & Row*, 471 U.S. at 548.

2. RTSC merges all of the statutory 17 USC §101 and argues that any collection of data is necessarily a selection of that data.

RTSC tries to "blur" the statute by merging all the statutory criteria into one disjunctive phrase. e.g., "the author independently collected, assembled, selected, coordinated, or arranged preexisting individual listing information into a directory." (Resp. Br. 5.) That is not what the statute says. The statute (17 USC §101) calls for (1) "collection and assembling of preexisting materials or data" that are (2) "selected, coordinated, or arranged" in such a way that (3) the "resulting work as a whole constitutes an original work of authorship." The statute requires all three in the conjunctive.³

RTSC attempts to make collection and assembling the equivalent of selection, coordination, or arrangement. "There can be no doubt that the gathering together of the particular material that is placed in a telephone directory involves collection, assembly, selection, coordination, and arrangement as those terms are used in the 1976 Act." (Resp. Br. 18.) This is nothing more than the "sweat of the brow" test rephrased. Gathering material is labor, just as collecting and assembling data is labor. Authorship also requires selection, coordination, or arrangement. Since RTSC has admitted the sweat of the brow theory is incorrect,⁴ its reargument of the theory under the name "gathering" must be rejected.

3. *Amici West, Ameritech, et al*, and Bell South also attempt to blur all the factors together into a disjunctive rather than conjunctive reading.

4. See Resp. Br. 32: "[L]abor, apart from the requisite selection, coordination, or arrangement is not sufficient to justify copyright protection—a claim not disputed by Rural."

3. RTSC's white pages compilation does not meet the statutory criteria of "selection, coordination or arrangement" required for authorship.

The term "selection" refers to the exercise of judgment in deciding which items to take from a given universe of data. *Patry* article p. 57. RTSC attempts to meet the statutory criteria of §101 for "selection" by enumerating as "selection" things it could have done, but did not. (Resp. Br. 18.) For example, how much data to include within each listing—RTSC printed name, address, and telephone number; whether to include middle names and initials—RTSC included some and excluded others, obviously printing the listing simply the way the subscriber signed up for phone service; whether to segregate residential, business, or government listings—RTSC put all the listings together; whether to include street address—RTSC included some; whether to arrange by towns or as one combined directory—RTSC listed all its listings together; and the closing date and geographical scope of the directory—RTSC published the directory once a year as required under Kansas law and covered its entire exchange area.

The claim that RTSC *could have* done some type of selection but did not hardly makes RTSC an author.⁵ RTSC simply published an alphabetical list of all its subscribers. According copyright protection to a compilation "based on the decision to include all data would effectively grant copyright to the mere idea of such a compilation, in contravention of the

5. The crux of RTSC's selection argument is that whatever RTSC did was an "act of selection." (Resp. Br. 18, fn 10). An act of selection is simply another way of saying *labor*, which is not authorship. This selection argument was not made in the courts below and there is no evidence in the record to support the claim that RTSC made any decisions of this sort or ever considered producing anything other than the generic telephone book that appears in the record. See *New York Times Co. v. Roxbury Data Interface, Inc.* 434 F.Supp 217, 222 n. 2 (D.N.J. 1977). "The compilation of a telephone directory requires the compiler only to ascertain the fact of telephone subscribership; the compiler is not required to make any significant subjective judgment."

important limitation on protection for all works of authorship contained in §102(b) of the Copyright Act." *Patry* article, p. 59.

According to the Copyright Office "arrangement or coordination" refers "to the ordering or grouping of data into lists or categories that go beyond the mere mechanical grouping of data as such, for example, the alphabetical, chronological, or sequential listings of data." *Guidelines for Registration of Fact Based Compilations* at 1 (Rev. Oct. 11, 1989) quoted in *Patry* article, p. 60. RTSC's directory provides for no ordering or grouping of its listings. It is simply an alphabetical list of all its subscribers.

Any potential "selection, coordination, or arrangement" by RTSC of its directory is not a factor which was copied in any manner by Feist. The arrangement and content of Feist's directory differs significantly from RTSC's. If RTSC and its *amici* are arguing that the alphabetical listing of a name followed by an address and a telephone number is an "arrangement" which has been copied, the answer is no. The RTSC listings are interfiled with 40,000 other listings. The name, address, telephone number sequence of a listing is simply the way a telephone directory is arranged. That arrangement is not copyrightable. *Cooling Systems*, 777 F.2d at 492. The "idea" of a telephone directory is also not copyrightable. 17 USC §102(b).⁶

Amici Ameritech, et al., and West both argue that the alphabetical listing of all of RTSC's listings somehow involves more coordination or arrangement than listing of a portion. *Amicus West*, by way of example, argues that there is more authorship in a list of all the military battles that occurred in recorded time as opposed to a list of those battles which the compiler deems "most decisive" in world history. This ignores the statute entirely. The person listing all the battles in recorded time is not an "author." He is a laborer; he has only "collected and assembled." The person making a selection as

6. See also *Patry* article, p. 59, "the functional or commercial constraints that adversely affect the compiler's discretion may limit or even bar protection."

to the most decisive is the "author." See *Eckes v. Card Prices Update*, 736 F.3d 859 (2nd Cr. 1984) ("*Eckes*").⁷

B. Preexisting data may be copied from a copyrighted compilation pursuant to 17 USC §103 (b).

RTSC and its *amici* also argue that 17 USC §103(b) which requires preexisting material in a copyrightable compilation to remain available to later compilers does not apply here, either because it was not intended to apply by Congress or because it covers only preexisting *materials* and not *data*. That reading would make §103(b) mere surplusage as applied to compilations since, by definition, public domain facts and data are freely available to all who would use them. 17 USC §102. In addition, *amicus Ameritech, et al's*, argument that §103(b) only applies to preexisting *material* and not *data* is disposed of by RTSC's admission that it "collect[ed] and assemble[d] preexisting *material*." (Resp. Br. 17.)

Section 103(b) requires that a distinction be drawn between the unprotectable "preexisting material employed in the work" (the names, addresses and telephone numbers of subscribers) and the protectable "material contributed by the author" (original selection, coordination, or arrangement) if there is any.

Section 103(b) explicitly applies to compilations and is not mere surplusage. Consistent with this Court's holding in *Harper & Row*, it states that only the original authorship in a compilation of preexisting materials (i.e., original selection, coordination, or arrangement of preexisting facts or data) is

7. It is hard to comprehend RTSC's choice of *Eckes* as its authority on this issue. (Resp. Br. 35 n. 20.) In *Eckes*, the Second Circuit's finding of copyrightability was based not on the inclusion in the compilation of the universe of all 18,000 baseball cards manufactured from 1909 to 1979, but on the compiler's selection of 5,000 of these cards as "premium" cards. As RTSC recognizes, the court specifically found that the compiler "exercised selection, creativity and judgment" in making this choice. 736 F.2d at 863. It did not, however, hold that copyright would be available for a comprehensive directory of all baseball cards, regardless of the directory's value to collectors or the amount of investment required.

protected by a compilation copyright; the preexisting facts or data themselves may be discovered in and copied from the compilation without infringing the copyright.

C. Copyright does not preclude all copying from a copyrighted work, but rather protects only against substantial copying of original expression.

The *amici* herein misconstrue the substantial similarity doctrine. RTSC and its *amici* argue that mere proof of "copying" is sufficient to support the decision below, quoting 3 M. & D. Nimmer, *Nimmer on Copyright*, §13.01 at 13-4 ("Nimmer"). This confuses proof of "copying" with proof of infringement and cites *Nimmer* out of context.

The standard test for copyright infringement requires a plaintiff to prove not only that the defendant used or "copied from" plaintiff's copyrighted work, but that the copying amounted to an "improper appropriation" of plaintiff's protected expression. "Ordinarily, wrongful appropriation is shown by proving a 'substantial similarity' of copyrightable expression." *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2nd Cir.), *cert. denied*, 449 U.S. 841 (1980). See also Patry, *Latman's The Copyright Law*, 196-197 (6th ed. 1986) ("Patry") (a plaintiff must establish that what was taken from the copyrighted work is "substantial and material...to constitute an unlawful appropriation [of the plaintiff's copyrightable expression], i.e., that the works are 'substantially similar'"); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907, 908 (3rd Cir.), *cert. denied*, 423 U.S. 863 (1975) (a defendant's admitted copying does not answer the question of whether the parties' works were substantially similar in expression.)⁸

8. The Third Circuit in *Salkeld* clarified the point upon which RTSC and its *amici* are confused; namely, that "substantial similarity to show that the original work has been copied is not the same as substantial similarity to prove infringement." 511 F.2d at 907. See also, Patry, 193 & n. 18 (discussing dual usage of phrase "substantial similarity" to describe "both that type of similarity used to establish indirect proof of copying and that necessary to establish a *prima facie* case of infringement.")

The efforts of RTSC and its *amici* to avoid the infringement analysis required under the substantial similarity test are understandable: Courts have strictly applied the test in the context of factual works and have found no infringement where only data, as opposed to copyrightable expression, have been copied. In *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984), for example, the Ninth Circuit (Judge Goodwin) held that because of the "narrow range of expression" available to authors of fact works, "...similarity of expression may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed." Similarly, in *Cooling Systems and Flexibles v. Stuart Radiator*, 777 F.2d 485, 492 (9th Cir. 1985), the court held that "the authors of a factual work ultimately must show that what has been taken from his expression is something more than what 'must unavoidably be produced by anyone who wishes to use and restate' the facts that form the greater part of the work."

When juxtaposed with the "sweat of the brow" jurisprudence upon which RTSC and the *amici* rely, these cases demonstrate the anomalous trend in the minority circuits to provide telephone directories more extensive copyright protection than other fact works despite the absence of any statutory basis for such disparate treatment.⁹

The record here contains ample evidence that Feist's AREA-WIDE directory bears no "substantial similarity" to RTSC's telephone directory.

D. The "sweat of the brow" doctrine cannot be reconciled with the 1976 Act and was not adopted by or approved in any manner by the Act.

9. Compare *Illinois Bell Tel. Co. v. Haines and Co., Inc.*, 905 F.2d 1081, 1086 (7th Cir. 1990), finding infringement where compiler copied white pages listings without conducting independent canvass, with *Nash v. CBS, Inc.*, 899 F.2d 1537, 1542-43 (7th Cir. 1990), "Copyright law does not protect hard work (divorced from expression)... in an author's research of book; others may freely use his work"...as a source of facts and ideas.

After admitting "sweat of the brow" does not apply, RTSC and its *amici*, nevertheless, spend most of their argument defending the "sweat of the brow" cases, i.e. *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 281 F.83 (2nd Cir.), cert. denied, 259 U.S. 581 (1922) ("*Jeweler's Circular*") and *Leon v. Pac. Tel. & Tel.*, 91 F.2d 484 (9th Cir. 1937) ("*Leon*"), and the "sweat of the brow" law review article, Denicola, *Copyright in a Collection of Facts: A Theory for the Protection of Non Fiction Literary Works*, 81 Colum. L. Rev. 516 (1981) ("*Denicola*").

Denicola's theory¹⁰ was noted in the Second Circuit case of *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 751 F.2d 501, 506 (1984). There the district court had upheld copyrightability holding that FII (Plaintiff, Financial Information, Inc.) was unquestionably "assembling, connecting, and categorizing disparate facts" and the FII employees who put together the daily call bond service "assemble into one handy compilation disparate information about thousands of calls." The Second Circuit did acknowledge that this theory had the support of at least one commentator, *Denicola*. Nevertheless, as Judge Oakes instructed, there is "now updated Second Circuit precedent to be taken into account," citing *Eckes*. Judge Newman, in concurring, held that the work may receive a valid copyright only if something has been added to the data; the "authorship of the compiler in making the requisite selection, coordination, or arrangement of the data." Judge Newman also noted that the fact some language in *Jeweler's Circular* and *Leon* supported a different view "is no reason for us to disregard the statutory criteria that Congress articulated in 1976 when it enacted the current statute. The 'sweat of the brow' rationale is no substitute for meeting one of those statutory criteria." (751 F.2d at 510.)

10. *Denicola* finds authorship in the collection of data. Perhaps revealingly, Resp. Br. 33 inserts the word "[selection]" immediately following the word "collection" in a quote from the *Denicola* article. That is not a portion of the quote, but obviously is Respondent's admission that the statutory criteria—selection—controls. *Denicola's* "sweat of the brow" article is criticized in Patry, *Copyright and the Collection of Facts: A Reply*, 6 Comm. and Law 11 (Oct. 1984).

On remand the district court found there was insufficient proof of independent creation to render the bond cards copyrightable. As noted by Judge Lumbard on the second appeal, "The researchers has five facts to fill in on each card—nothing more and nothing less." They sometimes did minor additional research in order to find these facts, but little "independent creation" was involved. (808 F.2d 204, 208.) Similarly here, all Feist used from RTSC's compilation were the white page listings—three facts: name, address, and telephone number, "nothing more and nothing less."

With regard to RTSC's and its *amici's* heavy reliance on *Leon* and *Jeweler's Circular*, it is significant to note a point RTSC and its *amici* fail to reveal to this Court. That is, the very Circuits which decided *Leon* and *Jeweler's Circular*, the Ninth and the Second, have both disavowed them since the 1976 Act. See *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 573 (9th Cir. 1987); *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 751 F.2d 501, 505-6, 510 (2nd Cir. 1984). Both the Second and Ninth Circuits, which hear the majority of the copyright cases in this country, have turned away from those early copyright decisions. This Court should instruct the other Circuits to likewise follow the statutory rationale.¹¹

1. The "Legislative History" cited by RTSC as supporting "sweat of the brow" does not.

RTSC and its *amici* ask this court to make a great leap of faith: because Congress stated its intention to continue the preexisting general standard of originality, therefore it must have intended to continue all preexisting case law on every aspect of the subject of copyrightability, including compilations. (See e.g. West Br. p. 12 n. 7). This additional intent is to be read into legislative history despite the utter absence of any reference to the issue, and despite the enactment of explicit

11. Lower courts have previously misconstrued other provisions of the 1976 Act as continuing prior law. See *Community for Creative Non-Violence v. Reid*, 109 S.Ct. 2166 (1989), cited in the Patry article, p. 50.

statutory language negating the availability of protection for the "sweat of the brow" alone.

In its attempt to bolster this unorthodox statutory interpretation, RTSC lists the very few references to *Leon* or *Jeweler's Circular* it could find in 15 years of background materials amassed in connection with the revision process that led to the 1976 Act. Not one of these references was made by Congress or the Copyright Office (the principal drafter of the Act).

For example, RTSC submits that in adopting the 1976 Act "the operative language from *Jeweler's Circular* was approved" by Congress. (Resp. Br. 29). The citation to *Copyright Law Revision: Studies Prepared for the Subcomm. on Patents, Trademarks & Copyrights of the Senate Comm. on the Judiciary*, 86th Cong., 1st Sess. Part 1 at 86 (Comm. Print 1960) does not, however, support that statement. In the forward to those studies, page IV, Congress states:

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are solely those of the authors.

RTSC's citation is from Study No. 3 prepared by the staff members of NYU Law Review. (See p. 61 of the Studies.) Even the *Jeweler's Circular* quote at p. 86 is prefaced with "Interestingly, one court stated..." hardly an approval even by the law students.

The remaining legislative history authorities cited by RTSC (Resp. Br. 29) are from *testimony* or *letters* from Ralph Dwan, John Schulman, and Paul Zurkowski, none of whom were Congressmen or Senators.

The CONTU citation (Resp. Br. 29, 30) is also of no assistance to RTSC. See *Whelan Associates v. Jaslow Dental Laboratory*, 797 F.2d 1222, 1241 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987): CONTU's statements on Section 102(b) are not authoritative, because "there is no sense in which [CONTU's report] represents the will of Congress with respect to provisions not amended in response to the Report." Here neither the compilation definition of §101 nor the

preexisting materials provision of §103(b) were amended in response to the CONTU Report.

Commission Reports, studies, testimony and letters are not Legislative History. The actual Legislative History is detailed in the *Patry* article, pp 45-48 in general and pp 52-57 specifically, regarding compilations. *Patry* concludes that Congress did not intend to continue prior "sweat of the brow" decisions under the 1976 Act. See p. 49 fn 46, *Patry* article.

E. The additional arguments of RTSC and its amici concerning economic incentives and unidentified interests in other undisclosed compilations and databases are simply aimed at eliminating competition, not at determining intellectual copyright provisions.

RTSC and its amici argue that this Court should refrain from treating RTSC's white page list as uncopyrightable material because to do so would adversely affect unidentified interests in other undescribed compilations and "databases." Interestingly though, the only discussion of these affects by way of a specific example of a compilation or database affected is by *amicus* United States Telephone Association (USTA Br. 10). That discussion concerns the public being deprived of airline flight schedules. What *amicus* fails to point out in its example is that Feist, not RTSC, would be in the position of the compiler there. RTSC would be in the position of the airline. Wouldn't the airline want its schedule published widely to facilitate use of its flights?

Likewise, "telephone directories serve as a means by which use of the telephone is facilitated." (USTA Br. 2). If copyright law is intended to benefit the public by allowing access to information, *Harper & Row*, p. 546, citing *Sony Corp v. Universal City Studios*, 464 U.S. 417, 429, 477 (1984), and if telephone directories facilitate phone usage, wouldn't RTSC want listings published widely to facilitate use of its phone lines?

The obvious answer to this question should dispose of RTSC and its amici's argument that without the economic

incentive of copyright, phone companies may take "less care," [and less] "vigor and thoroughness" in compiling telephone directories. (See *Ameritech, et al* 18, Resp. Br. 37 fn 21.) In fact, the entire economic incentive argument is further refuted in this case since the regulatory obligation to produce a telephone directory confers upon the telephone company a constitutional entitlement to just and reasonable compensation for its investment in the directory. Economic incentive should not be relevant here.

The issue is not whether it would be desirable to protect the compiler's labor or investment, but whether Congress has done so. Congress plainly has not.

(*Patry* article 64-65.)

The candid answer to the question has been anticipated in the concern expressed by one scholar:

Of particular concern is the apparent use of claims of copyright in the white pages not to vindicate intellectual property rights, but rather to eliminate competition for yellow page advertisers.

(*Patry* article, p. 40).

This Court should not allow copyright to be used in such a manner.

CONCLUSION

The decisions below should be reversed and judgment entered for Feist.

Respectfully submitted,

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